Supreme Court, U. S.
FILED
SEP 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-168

Termar Navigation Company, Inc., As Managing Owner of the SERAFIN TOPIC,

Petitioner,

versus

SS POLANICA, and against POLSKIE LINIE OCEANICZNE, as Owner of the SS POLANICA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Joseph M. Allen, Jr.
Counsel for Respondent
Post Office Box 1743
Mobile, Alabama 36601

Hamilton, Butler, Riddick
& Latour
Of Counsel

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 · 504 822-1611

INDEX

Page

Questions Presented 1

Statement of Facts and of the Case 4

Reasons for Not Granting Writ 9

Argument 10

A. Questions Relating to Issues of Fault 10

B. Bridge-to-Bridge Radiotelephone Act — Petitioner's Question C 14

C. Right of Discovery 15

D. Affidavits 18

Conclusion 19

Certificate of Service 20

CITATIONS

Cases:

A/R Seljan v. Pioneer Leasing Corp., 406 F.2d 768, 769 (5th Cir. 1969) 3

Baker v. F & F Inv., (2nd Cir. 1972) 470 F.2d 778, cert. denied 93 S.Ct. 2147, 411 U.S. 966, 36 L.Ed. 2d 686 16

Chaney v. City of Galveston, (5th Cir. 1966) 368 F.2d 774, 776 4

Duignan v. United States, 274 U.S. 195, 71 L.Ed. (1927) 18

Huff v. N.C. Cass Co. of America, (5th Cir. 1972) 468 F.2d 176 16

Lake Erie Trans. Co. v. Gilchrist Trans. Co., (6th Cir. 1906) 142 F. 89 12,14

CITATIONS (Continued)

Page

Lawn v. United States, 355 U.S. 339, 2 L.Ed. 2d 321 (1958) 18

M.S.A. Const. Co., Inc. v. Crafts, Inc., (E.D. Wisc. 1973) 58 F.R.D. 215 16

McAllister v. United States, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20 (1954) 4

Movible Offshore, Inc. v. M/V Wilken A. Falgout, 471 F.2d 268, 272-73 (5th Cir. 1973) 3

The Victory and The Plymothian, 168 U.S. 410, 18 S.Ct. 149, 42 L.Ed. 519 (1897) 12,14

Statutes:
United States Code:
T.33, Sec. 1201 9
T.33, Sec. 1204 15

Miscellaneous:
Federal Rules of Civil Procedure:
Rule 52(a) 2,5,8,10

Supreme Court Rules:
Rule 19 5,9,19
Rule 23(h) 9
Rule 23(4) 19

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-168

Termar Navigation Company, Inc., As Managing Owner of the SERAFIN TOPIC,
Petitioner,

versus

SS POLANICA, and against POLSKIE LINIE OCEANICZNE, as Owner of the SS POLANICA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

The basic and fundamental question to be considered is whether or not this Honorable Court should grant a writ of certiorari to review the decision of the Fifth Circuit Court of Appeals on an interlocutory admiralty appeal wherein that Court held:

> "We have thoroughly reviewed and carefully considered the record and the contentions of

> the parties in their briefs and at oral argument, and *we conclude that the court's findings are supported by the evidence and not clearly erroneous, and that its conclusions are correct.*" (page 27a, Petition) (Emphasis supplied)

We respectfully submit the writ should be denied since such a review is clearly not anticipated under Rule 19(b) of this Honorable Court.

Petitioner's Brief misstates the nature of the legal issue, or issues, sought to be reviewed. The Trial Court entered extensive Findings of Fact and Conclusions of Law holding, inter alia, that the sole *fault* of the collision was Petitioner's negligence and that Respondent and those aboard her were not guilty of *any fault* which proximately caused or contributed to the collision. On review, the Fifth Circuit Court of Appeals held that the Findings of Fact and Conclusions of Law were supported by the evidence and not clearly erroneous, and that the Conclusions of the Trial Court were correct.

Petitioner has never contended that the findings of the Trial Court were not supported by credible evidence and has never argued that the findings were clearly erroneous. Indeed, Petitioner does not now assert that the Findings of Fact were clearly erroneous nor does it now assert that the Fifth Circuit Court of Appeals erred in applying the criteria set forth in Rule 52(a) of the F.R.Civ.P.

Under these circumstances, should this Honorable Court review the holding of the Fifth Circuit Court of

Appeals that the Trial Court's Findings of Fact were supported by the evidence and were not clearly erroneous? We respectfully submit the Court should not.

An examination of Petitioner's questions (a-d, pages 4 and 5 of Petition) reveals that it seeks only to have this Court determine *de novo* the *fault* of the parties. The Petitioner totally disregards the decisions of the Fifth Circuit Court of Appeals as set forth in its decision holding specifically that the finding of fault in a collision case is primarily a fact issue to which the clearly erroneous rule applies. *Movible Offshore, Inc. v. M/V Wilken A. Falgout*, 471 F.2d 268, 272-73 (5th Cir. 1973); *A/R Seljan v. Pioneer Leasing Corp.*, 406 F.2d 768, 769 (5th Cir. 1969). (page 27a, Petition)

The factual issue of fault can only be gleaned from the total record which, in fact, was carefully reviewed by the Fifth Circuit Court of Appeals which concluded:

> "The evidence presented to the court during the thirteen-day trial was extensive, and included depositions, oral testimony from a number of witnesses, and over 200 exhibits. The facts were, and are, hotly disputed at virtually every conceivable point. The district court entered extensive findings of fact and conclusions of law. Essentially, the court held that the collision was proximately caused by the SERAFIN TOPIC's negligence in allowing herself to drift westward into the path of the POLANICA and failing to straighten up and come ahead sufficiently to allow the

POLANICA to pass safely; and that neither the POLANICA nor those aboard her were guilty of any fault that proximately caused or contributed to the collision. The SERAFIN TOPIC's theory, rejected below, is basically that she was on her own (east) side of the channel, and that the collision occurred when the POLANICA suddenly sheered to port." (page 26a, Petition)

The extensive Findings of Fact and Conclusions of Law of the Trial Court are set forth in their entirety in the Appendix to the Petition at pages 1a through 22a, which Respondent adopts as part of her Statement of the Case. Petitioner does not here, nor did it below, attack the Findings of Fact as clearly erroneous, and urges this Court to ignore the well-established rule that it will not substitute its own assessment of the disputed facts for the considered judgment of the Trial Judge who heard all of the testimony, observed the demeanor of the witnesses and made the necessary credibility choices. *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6, 99 L. Ed. 20 (1954) and *Chaney v. City of Galveston*, (5th Cir. 1966) 368 F.2d 774, 776.

STATEMENT OF FACTS AND OF THE CASE

The recitation of facts contained in the "Questions Presented" (pages 2-5 of the Petition) and in the "Statement of Case" (pages 7-14 of the Petition) were prepared in disregard of the applicable principles of review that the evidence is to be viewed and construed favorably to the prevailing party below, and all

reasonable inferences of which the evidence is fairly susceptible should be drawn in support of, and not against, the judgment rendered below.

Petitioner's recitation of facts is not a fair statement of the facts and constitutes nothing more than selective editing and presenting those facts which Petitioner deems most favorable to its case, completely ignoring substantial evidence to the contrary presented by the POLANICA which clearly supports the Trial Court's findings. The thrust of the Petition is that this Court should make *de novo* findings of fault without presenting to this Court even a brief summary of the 1900 pages of testimony heard by the Trial Judge and reviewed by the Fifth Circuit Court of Appeals. Petitioner recites isolated segments of selected testimony, but fails to acknowledge that there was substantial conflicting testimony. It premises its arguments on "facts" and "theories" treating the same as uncontroverted, but fails to acknowledge or inform this Honorable Court that such were rejected by the Trial Judge. It fails here as it did in the Fifth Circuit Court of Appeals even to argue that the Findings of Fact are not supported by credible evidence. In essence, Petitioner requests this Court to reject Rule 52(a), and completely ignore the function of this Court in granting writs of certiorari within the purview of Rule 19.

Illustrative of the selective editing and misstatement of the facts is Petitioner's statement on page 4 of the Petition:

"She (POLANICA) did not, by radio, advise of her hard starboard rudder order or of her full astern, drop both anchors orders."

This completely ignores the testimony of the pilot of the POLANICA, who stated that he advised the pilot of the SERAFIN TOPIC by radio of those specific facts prior to the collision. (TR 919) The pilot of the SERAFIN TOPIC (Petitioner) at two points in his direct testimony (TR 97-98) maintained that he did not learn this information until after the collision. However, on cross-examination he admitted that he did have the radio conversation with the POLANICA's pilot prior to the collision, but hedged as to what was said. (TR 191) The testimony of the pilot of the POLANICA clearly indicates that the conversation occurred at the time that the POLANICA was letting the anchors go, which followed instantaneously the hard starboard and full astern orders. It is apparent that there was a direct conflict between the two pilots as to not only when the conversation in fact took place, but also as to what was said. It was the duty of the Trial Court to reconcile the testimony and to judge the credibility of the witnesses. The Trial Judge obviously rejected the testimony advanced by Petitioner.

Petitioner's position here is obscure and contradictory for at trial it insisted that up to thirty (30) seconds prior to collision both vessels were in perfect passing position with each well on their respective side of the channel when the Respondent suddenly sheered to port, crossed the channel, and caused the collision; yet now Petitioner abandons that theory. At trial Petitioner repeatedly insisted the wind had no effect on it, yet now admits the Petitioner did drift into the

path of Respondent because of the effect of the wind (page 21, Petition). Petitioner insisted at trial that Respondent should have come past the dredge at full ahead speed yet now asserts that Respondent should have slowed to less than five (5) miles per hour when passing the dredge. (page 21, Petition)

The Trial Court was aware of the wind force, its direction and effect on the maneuverability of Petitioner's vessel and rejected the testimony of Petitioner that the same had no effect on its vessel; the Court was aware of Petitioner's insistence that the Respondent sheered yet observed the strenuous objection of Petitioner to the introduction of testimony by Respondent regarding the physical configuration of the channel bottom and sides at the place of the collision, facts essential to a proper understanding of the physical forces required for sheering; the Trial Court heard and evaluated the dove-tailed testimony and selective recall of Petitioner's witnesses of events immediately preceding the collision as to minute details concerning helm orders, engine orders, and even the ability to recall various orders to the exact degree and the exact minute, yet the total failure of the same witnesses to recall other orders, events and maneuvers which were given under less stressful conditions. Furthermore, Petitioner ignores all of the damaging testimony elicited at trial as to the effect of propeller wash on her maneuverability, the fact that her engine was stopped for five minutes prior to the collision, the substantial testimony that the pilot of Petitioner's vessel waited too long to commence her passing maneuvers (TR 149, 1828) while at the same time repeatedly requesting the POLANICA to hurry

up and come ahead. (See also Finding of Fact #13, page 7a, Petition.) This Finding of Fact has not been attacked as clearly erroneous.

Petitioner and Respondent presented in the Trial Court totally different versions as to how the collision occurred. Virtually every conceivable issue was disputed in the thirteen-day trial in which many witnesses were heard ore tenus by the Trial Court. During the testimony presented ore tenus on behalf of both parties, liberal use was made of ship models, charts and the courtroom blackboard to illustrate positions and movements of the vessels in relation to each other, the dredge, the bouys and beacons in the channel at virtually every minute prior to, at the time of and subsequent to the collision. During that time the Court observed the demeanor of the witnesses on direct and cross-examination necessarily making credibility choices on virtually every factual issue. As the Fifth Circuit Court of Appeals recognized in its decision: ". . . Virtually every finding here required credibility choices by the trial judge . . ." (page 27a, Petition). It is obvious therefore, that the Trial Court entered its extensive Findings of Fact and Conclusions of Law based on the totality of facts elicited at the trial contained in the 1900 pages of testimony. The Trial Judge was obviously in the best position to make the factual determinations required in this case. It is precisely for this reason that the applicable principle of review exists that the evidence is to be viewed and construed favorably to the prevailing party below and that all reasonable inferences of which the evidence is fairly susceptible should be drawn in support of, and not against, the judgment rendered below. Rule 52(a) F.R.Civ.P. is but the codification of that principle.

REASONS FOR NOT GRANTING WRIT

Petitioner now seeks to have this Court issue a writ of certiorari to the Fifth Circuit Court of Appeals and as reasons therefor states on page 16 of the Petition that the Fifth Circuit Court of Appeals:

I. "has decided a federal question in a way in conflict with the applicable decisions of this Honorable Court" and

II. "has sanctioned, by the District Court such a departure from the accepted and usual course of judicial proceedings, as to call on this Honorable Court to exercise its power of supervision." and

III. has asked for a determination as to the purpose of the Vessel Bridge-to-Bridge Radiotelephone Act, 33 U.S.C., Sec. 1201, et seq., and its implementing regulations.

Petitioner has in no way complied with Rule 23(h) requiring a "direct and concise argument amplifying the reasons relied on for the allowance of the writ."

Although Petitioner alleges in Rule 19 terminology on page 16 of its Petition that the Court of Appeals decided a federal question in a way in conflict with the applicable decisions of this Court, Petitioner does not identify the federal question, neither does it show how the Findings of Fact were decided in a way in conflict with the applicable decisions, nor does it identify the

"applicable decisions." Petitioner is unable to do so because the Fifth Circuit Court of Appeals in its decision expressly recognized and followed the applicable rules and pertinent decisions of this Court when it stated:

> "Our review of fact findings is governed by the dictates of Rule 52(a), F.R.Civ.P., which provides in part: 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' " (page 26a and 27a of Petition)

Petitioner does not amplify its reasons for requesting the writ except to the extent that the questions set forth on pages 4 and 5 of the Petition constitute the amplification of the reasons for granting the writ. An examination of these questions shows that there are no issues which are properly before this Court.

ARGUMENT

A. Questions Relating To Issues Of Fault.

Petitioner's arguments labeled "Statutory Violations" (page 17, Petition) and "Bridge to Bridge Radiotelephone Act" (page 22, Petition) are nothing less than an effort to have this Court decide, *de novo*, the factual question of fault. This is confirmed by an examination of the questions a-d raised at pages 4 and 5 of the Petition. The Fifth Circuit Court of Appeals has consistently held and so stated in its decision below, that a finding of fault in a collision case

primarily is a factual issue to which the clearly erroneous rule applies (page 27a, Petition).

In spite of Petitioner's contentions to the contrary, the Trial Court specifically found that the POLANICA and those aboard her were not guilty of *any* fault (statutory or otherwise) which proximately caused or contributed to the collision (page 22, Petition) and specifically found that Petitioner was at *sole* fault in causing the collision (page 17a, Petition). The Fifth Circuit Court of Appeals, after thoroughly reviewing the record and the contentions of the parties in their Briefs and at oral argument, concluded that the Trial Court's findings of fault were supported by the evidence, were not clearly erroneous and that its conclusions were correct. (page 27a, Petition)

Petitioner did not attack the Findings of Fact as being clearly erroneous in the proceedings before the Fifth Circuit Court of Appeals, nor does it allege in its Petition here that these Findings are clearly erroneous. Petitioner does not attack the applicable decisions of the Fifth Circuit that findings of fault in a collision case are primarily a factual issue.

It therefore, follows that these findings of fault are binding on this Court and necessarily preclude any consideration of the matter set out in questions a-d in the Petition.

In addition to being inextricably wrapped up in a factual determination of fault, the questions relating to the purported statutory violations do not hold up in light of the facts elicited at trial and found by the Trial Court. In support of the Trial Court's finding that

neither Respondent nor anyone on board her were guilty of any fault which proximately caused or contributed to the collision, which finding necessarily encompasses consideration of statutory violations, we must consider that the Trial Court found specifically that there was no question that the vessels would pass other than port-to-port as agreed, that such agreement was proper, and that the vessels at all times understood and intended to carry out that agreement (see Finding #27, page 22a, Petition) and that the pilot of the Respondent reasonably anticipated that Petitioner would clear the west side of the channel (Respondent's side) and return to her own side, *The Victory and The Plymothian*, 168 U.S. 410, 18 S.Ct. 149, 42 L.Ed. 519 (1897), and that Petitioner would comply with its agreement. *Lake Erie Trans. Co. v. Gilchrist Trans. Co.*, (6th Cir. 1906) 142 F. 89. This is particularly true in this case since Petitioner repeatedly urged Respondent to hurry up and come on by. That all questions of alleged statutory fault on the part of Respondent are totally without merit is evident upon a reading of Findings of Fact #15 and #16 of the Trial Court (page 9a and 10a, Petition) which were not attacked by Petitioner in the Fifth Circuit Court of Appeals as being clearly erroneous and which were found by the Fifth Circuit Court of Appeals to be supported by the evidence. These Findings which have not been questioned in this Court are as follows:

> "15. Until 2 minutes prior to the collision the engines of the SERAFIN TOPIC had been stopped for 6 minutes, according to her bridge bell book. She then put her engines on dead slow ahead for 1 minute, at which time the Captain of the SERAFIN TOPIC estimated her

speed at 3 knots. It is further undisputed that the wind, which was blowing East-Southeast and against the starboard side of the SERAFIN TOPIC tended to push the SERAFIN TOPIC toward the Western bank and into the path of the POLANICA. A review of the testimony offered through witnesses and the bridge bell book of the SERAFIN TOPIC reflects that the SERAFIN TOPIC was very much concerned about the passing taking place too close to the dredge and through her own witnesses stated that she did not want to get too far over to the east side. In fact, the pilot of the SERAFIN TOPIC testified that he was concerned whether he was crowding the POLANICA. This was notwithstanding the request by the pilot of the POLANICA for the SERAFIN TOPIC to straighten up and come ahead when the POLANICA passed the dredge. Instead, the SERAFIN TOPIC continued to kill time and attempted to delay her forward progress so that the meeting would take place as far south of the dredge as possible. Although this was a head to head meeting, the pilot of the SERAFIN TOPIC stated that he did not intend to come ahead and straighten out his vessel until the bow of the POLANICA had passed the bow of the SERAFIN TOPIC. Less than 30 seconds before the collision, the SERAFIN TOPIC executed a full ahead and a hard starboard simultaneously. This maneuver caused the stern of the SERAFIN TOPIC to swing further to the west and further in front of the path of the POLANICA.

"16. It was immediately apparent that the SERAFIN TOPIC did not intend nor had she commenced her passing maneuver when the vessels were 200-300 feet apart. Only when collision seemed inevitable did the SERAFIN TOPIC take any action to straighten out or come ahead. The action ultimately taken by the SERAFIN TOPIC aggravated rather than alleviated the situation."

It must also be emphasized that SERAFIN TOPIC (Petitioner), while losing her maneuverability as set forth hereinabove nevertheless kept requesting POLANICA (Respondent) to hurry on by, as the SERAFIN TOPIC, the Petitioner, was about to blow ashore. (Finding of Fact #13, page 7a, Petition) If Petitioner was unable to comply with the agreement for a port-to-port passing, such knowledge was in the sole province of the Petitioner and the burden to communicate this inability to comply lay with Petitioner, not Respondent. *The Victory and The Plymothian*, supra; *Lake Erie Trans. Co. v. Gilchrist Trans. Co.*, supra.

B. Bridge-to-Bridge Radiotelephone Act — Petitioner's Question C

Question c (page 5, Petition) relating to the Vessel Bridge-to-Bridge Radiotelephone Act, when considered in the light of the facts found by the Trial Court that the vessels were in constant radio communication by means of sophisticated walkie-talkies customarily used by the Mobile Bar Pilots, the excellent and almost unlimited visibility prior to and at

the time of the collision, the findings that there was never any doubt that a port-to-port passing was intended, and that such a passing agreement was proper, make the act wholly inapplicable under the facts in the case. Further, the Act specifically provides in Section 1204 (page 31a, Petition):

". . . Nothing contained herein shall be interpreted as precluding the use of portable radiotelephone equipment to satisfy the requirements of this chapter."

Petitioner's argument here again illustrates its refusal to recognize that there was conflicting testimony in the Trial Court and that there was substantial testimony offered by the POLANICA that a radio conversation in fact took place between the two pilots simultaneously with the letting go of anchors prior to the collision. (TR 919) Petitioner refuses to recognize that the Trial Court accepted the testimony offered by Respondent and rejected the testimony offered by Petitioner on the question of whether or not a radio conversation took place, when such conversation took place, and the substance of the conversation. As the Fifth Circuit pointed out in its decision:

"The facts were, and are, hotly disputed at virtually every conceivable point. . . . Virtually every finding here required credibility choices by the trial judge . . ." (pages 26a and 27a of Petition)

C. Right Of Discovery

Question e at page 5 of the Petition is impertinent for the Trial Court did not deny Petitioner the right of dis-

covery and for Petitioner to so imply is grossly misleading. The Trial Court simply stated that inquiries into acts which allegedly occurred in 1961 and 1962, some twelve years prior to the collision, were too far removed in point of time from the facts alleged in the pleadings. Petitioner did not undertake any subsequent discovery, nor did it allege or show in its Petition how this was an abuse of the Trial Court's discretion. It is well recognized that the Trial Court has the authority to limit discovery to pertinent times in the past and this decision will not be reversed unless there is an abuse in discretion which results in substantial prejudice. *M.S.A. Const. Co., Inc. v. Crafts, Inc.*, (E.D. Wisc. 1973), 58 F.R.D. 215; *Huff v. N.C. Cass Co. of America*, (5th Cir. 1972) 468 F.2d 176; *Baker v. F & F Inv.*, (2nd Cir. 1972) 470 F.2d 778, cert. denied 93 S.Ct. 2147, 411 U.S. 966, 36 L.Ed. 2d 686. Not only has Petitioner failed to allege or show an abuse of discretion, but it has chosen both in the proceedings before the Fifth Circuit Court of Appeals and in the Petition herein to completely ignore the Findings of Fact by the Trial Court as set forth in Finding of Fact #22 (pages 13a and 14a, Petition), which Petitioner has never attacked as clearly erroneous, to the effect that the POLANICA had no steering gear malfunction on the night of the collision, nor was there any evidence to indicate any momentary malfunction.

On page 14 of the Petition under "Interrogatories" Petitioner refers to a test of the steering gear on the POLANICA following the collision by competent surveyors who *found nothing wrong*. What Petitioner fails to mention is that the two surveyors who conducted tests on the Respondent's steering gear were engaged by Petitioner, neither of whom was

called to testify by Petitioner. Finding of Fact #22 (page 13a, Petition) contains a full discussion of the pertinent facts as found by the Trial Court which is set out in its entirety, viz:

> "22. The Court finds that the POLANICA had no steering gear malfunction on the night of the collision nor was there any evidence to indicate any momentary malfunction. The steering mechanism on the POLANICA was powered by two hydraulic pumps powered by two electric motors. The POLANICA carried two separate electrical steering systems. The POLANICA, at the time of the collision, was operating on both pumps and motors, since it was customary while maneuvering to use both, while at sea she used only one pump and motor. Although the SERAFIN TOPIC engaged two marine surveyors who conducted unrestricted surveys on the POLANICA's steering apparatus on two separate occasions, one only two days after the collision, neither of these experts was called by the SERAFIN TOPIC. On the other hand, the POLANICA introduced the expert testimony of John N. van Aken, the marine surveyor who attended both surveys conducted by surveyors on behalf of the SERAFIN TOPIC and who testified that both tests were satisfactory and disclosed no malfunction nor defects. He further testified that in his expert opinion, the POLANICA had no steering gear malfunction or difficulty on the night of the collision. In addition, those on the bridge of the

POLANICA testified that they observed no steering malfunction prior to or after the collision, and that none of the warning systems, (red light and buzzer) on board the POLANICA designed to alert the bridge and engine room against such malfunctions sounded. The Captain of the POLANICA also testified that the steering gear had been checked in February 1973, during routine dry docking. Her Chief Engineer testified by deposition that no repairs or adjustments were made to the steering mechanisms between the time of the collision and its subsequent surveys. The Court therefore finds that the steering gear mechanism on board the POLANICA was in proper working order at the time of the collision."

It is significant to note that Petitioner did not attack Finding of Fact #22 as clearly erroneous in the Court below, nor does it now assert that such finding was not supported by the credible evidence.

D. Affidavits

Question f on page 5 of the Petition is not properly before this Court. Petitioner neither assigned nor argued before the Fifth Circuit Court of Appeals that the Trial Court erred in striking the Affidavits submitted with Petitioner's Motion for New Trial. There is therefore no basis for this Court to consider this question. *Duignan v. United States*, 274 U.S. 195, 71 L.Ed. (1927); *Lawn v. United States*, 355 U.S. 339, 2 L.Ed. 2d 321 (1958). It should be pointed out that it was not until after a decision was rendered by the Trial Court that

Petitioner sought to put before the Trial Court in Affidavit form additional cumulative evidence regarding sheering. Both parties had presented substantial evidence on sheering at the Trial Court level. (See Finding of Fact #25, page 15a, Petition.) In view of Finding of Fact #25 which has not been attacked by Petitioner as being clearly erroneous, there has been no showing that the ruling of the Trial Court striking the Affidavits resulted in, or even could have resulted in any prejudice to Petitioner. The Petition is absolutely devoid of any showing as to why the Trial Court allegedly committed error in striking the Affidavits. The six-line argument made by Petitioner on page 24 of its Petition clearly fails to comply with the requirements as set forth in Rule 23(4) of this Honorable Court and presents nothing for review.

CONCLUSION

It is respectfully submitted that Petitioner has failed to sustain its burden under Rule 19 to demonstrate that there are special and important reasons why the writ should be granted. The Fifth Circuit Court of Appeals did not decide "a federal question in a way in conflict with applicable decisions of this Honorable Court" nor has it "sanctioned by the District Court such a departure from the accepted and usual course of judicial proceedings, as to call on this Honorable Court to exercise its power of supervision." In spite of Petitioner's Rule 19 terminology to the contrary, the question below was purely and simply was there sufficient evidence to support the Findings of Fact and Conclusions of Law of the Trial Court. The Fifth Circuit Court of Appeals after a thorough review of the

record and extensive briefs, including hearing counsel at oral argument, concluded that the Trial Court's findings are not clearly erroneous, and that its conclusions are correct.

We submit the Petition should be denied.

Respectfully submitted,

JOSEPH M. ALLEN, JR.
Attorney for S/S POLANICA

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari have been served on John H. Tappan, Esquire, on the ____ day of September, 1976, by United States Mail, postage prepaid, at his mailing address, Post Office Box 8158, Mobile, Alabama, 36608.

JOSEPH M. ALLEN, JR.